11-0320-21159-CV

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

David Thul,

Complainant,

vs.

ORDER ON MOTION FOR SUMMARY DISPOSITION

Minnesota DFL Party,

Respondent.

The above-entitled matter came before the panel of Administrative Law Judges on the Respondent's motion for summary disposition. Respondent filed its motion on April 1, 2010. The Complainant filed a response to the motion on April 8, 2010, and the Respondent filed a reply on April 13, 2010. A telephone conference to hear argument on the motion was held on April 15, 2010, and the record with respect to the motion closed on that date.

David Thul ("Complainant") represented himself without counsel.

Alan Weinblatt and Jay Benanav, Attorneys at Law, Weinblatt & Gaylord, PLC, represented the Minnesota DFL Party ("Respondent ").

Based upon all of the files, records, and proceedings herein, and for the reasons set out in the attached Memorandum,

**IT IS ORDERED**:

1. That Respondent's motion for summary disposition is GRANTED.
2. That the hearing in this matter scheduled for Tuesday, April 27, 2010, is CANCELED.

Dated: April 20, 2010

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Presiding Administrative Law Judge

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

/s/ John Ellefson
JOHN ELLEFSON
Administrative Law Judge

## NOTICE

Under Minn. Stat. § 211B.36, subd. 5 this Order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. § § 14.63 to 14.6.

## MEMORANDUM

This Campaign Complaint concerns the special election that was held on January 26, 2010, to fill the seat vacated in Senate District 26. Senate District 26 is located in southeastern Minnesota and includes portions of Dodge, Freeborn, Goodhue, Mower, Olmsted, Rice, Steele and Waseca counties. The Complaint alleges that the Minnesota DFL Party violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material relating to the Republican-endorsed candidate Mike Parry.

Presiding Administrative Law Judge Barbara Neilson reviewed the Complaint and attachments and, by Order dated March 1, 2010, determined one allegation set forth a *prima facie* violation of Minn. Stat. § 211B.06. The remaining allegations were dismissed.

The allegation that survived *prima facie* review concerns statements in a campaign flyer prepared by the DFL and disseminated to residents of Senate District 26 on or about January 25, 2010. The statements in the flyer were directed at candidate Parry's call for a 15% across the board cut to balance the state budget. The flyer addressed the impact such a cut would have on Minnesota's nursing homes, which receive a considerable amount of their funding from the Medicaid program – a program that is jointly funded by the state and federal governments through a federal assistance matching formula. The flyer claimed that candidate Parry's call for a 15% cut in spending would actually result in a 30% cut in funding to nursing homes due to the loss of matching federal dollars. The specific statements at issue read:

> That means a 15% cut by the state is also a 15% cut by the federal government. That adds up to a 30% cut for care of the elderly and disabled.

The flyer cited a Minnesota House Research Department brief on Medical Assistance to support this claim.

The Complainant acknowledges that Mr. Parry did call for a "15% across the board cut" to balance the state budget. However, the Complainant contends that the claim in the flyer that Mr. Parry's proposed "15% cut by the state is also a 15% cut by the federal government . . . [adding] up to a 30% cut for care of the elderly and disabled" is false. According to the Complainant, the Minnesota House Research Department brief on Medical Assistance cited in the flyer does not support the claim that a 15% cut in state funding would *automatically* trigger a 15% cut in federal funding. In fact, the Complainant asserts that the research

brief documents several areas in which Minnesota provides more funding than is required by federal law for matching grants, and at least two instances in which the governor decreased state funding through unallotment but no corresponding cuts in federal funding occurred. The Complainant maintains that while a federal funding cut is possible, it is false to allege that such a cut would be automatic.

**Motion Standard**

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.[1] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.[2] A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.[3]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.[4] The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.[5] The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.[6]

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.[7] All doubts and factual inferences must be resolved against the moving party.[8] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[9]

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[1] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.
[2] *See* Minn. R. 1400.6600.
[3] *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).
[4] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).
[5] *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).
[6] *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986)).
[7] *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).
[8] *See*, *e.g.*, *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).
[9] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

**False Campaign Material**

Minnesota Statutes § 211B.06, subd. 1, prohibits intentional participation:

> … [i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact and not against unfavorable deductions or inferences based on fact.[10] Moreover, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.[11] Finally, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.[12]

To prove a violation, the Complainant must show by clear and convincing evidence that the statement is substantively false and that the person or persons who prepared and disseminated the statement did so knowing it was false or communicated it with reckless disregard of whether it was false. The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard from *New York Times v. Sullivan*.[13] The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondent "in fact entertained serious doubts" as to the truth of the statement or acted "with a high degree of awareness" of its probable falsity.[14]

The Respondent argues that the statements at issue on the flyer are true. The Minnesota House of Representatives' nonpartisan research report that was cited as the source of the statements on the flyer explains the federal Medical Assistance funding match for state services on page 20. The report states that

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[10] *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

[11] *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

[12] *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), *citing Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996);

[13] *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

[14] *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). *See also Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), *rev. denied* (Minn. 2006).

the federal share of Medical Assistance costs for each state is usually determined by a formula based on the state's per capita income and is recalculated annually. According to the report, Minnesota's federal share of Medical Assistance costs for 2009 and 2010 would have been 50 percent under the standard formula. However, in 2009 and 2010 the federal stimulus bill provided states with higher federal medical assistance funding. Thus, under this new formula, Minnesota's federal Medical Assistance funding was actually 60 percent in 2009 and almost 62 percent in 2010. Minnesota's FMAP is projected to return to 50 percent beginning January 1, 2011.

Respondent explains that since this higher level of funding was short-term and would end at the close of 2010, it chose to use the more conservative 50/50 match in its assertions on the flyer. Respondent further points out that other sources such as the conservative American Legislative Exchange Council and the non-partisan Kaiser Family Foundation and National Health Policy Forum have recognized that cuts made in state spending on Medicaid programs result in the matching federal funding being similarly cut. In a January 2009 article on the Federal share of Medicaid costs, the National Health Policy Forum identified Minnesota as a 50/50 matching state[15] and explained the matching federal medical assistance percentage (FMAP) formula in this way:

> With an FMAP of 50 percent, for every dollar a state spends on Medicaid, the federal government contributes one dollar; with an FMAP of 75 percent, the federal contribution is three dollars per state dollar. Likewise, whenever a state cuts its Medicaid spending, it will forgo its federal share.[16]

Respondent asserts that its intent in the flyer was to explain to voters the consequences of a 15 percent across-the-board cut in the state budget to a program that is funded through the use of federal matching funds. Respondent maintains that its statements were a conclusion drawn from facts presented in the House Research report and other sources and, as a conclusion, the statements cannot be held to be false.

Finally, the Respondent argues that the Complainant has failed to put forth any evidence to prove the Respondent distributed the flyer either knowing it was false or with reckless disregard of its truth or falsity.

In response, the Complainant initially makes a procedural argument contending that he was under no obligation to respond to Respondent's summary disposition motion by presenting evidence to support his allegations. The Complainant asserted both in his response letter brief and during the April 15th telephone conference that he would present evidence at the hearing to support his claims and that the Complaint should not be dismissed for lack of evidence at this stage prior to a hearing on the merits.

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[15] *See* Peters, *FMAP: The Federal Share of Medicaid Costs*, National Health Policy Forum (January 15, 2009) attached to Respondent's reply brief.
[16] *Id*. at 1.

The Administrative Law Judge understands that the Complainant is not an attorney and may be unfamiliar with the rules of procedure and motion practice. However, contrary to his assertions, he is obligated when served with a motion for summary disposition to put forward sufficient evidence to establish the existence of disputed material facts or risk dismissal of his complaint without a hearing.[17] Although the tribunal will review the evidence in the light most favorable to the nonmoving party, summary disposition cannot be defeated with "unverified and conclusory allegations or by postulating evidence that might be developed at trial."[18] Thus, Complainant's assertion that he will present evidence at the hearing is insufficient to defeat Respondent's motion.

The Complainant does, however, make several substantive arguments in opposition to Respondent's motion for summary disposition. First, he argues that the statements on the flyer are false because, as the DFL itself acknowledges, the federal share of Medicaid funding was actually higher in 2009 and 2010 than the 50/50 match claimed in the flyer. Thus, the Complainant asserts that the statements are false because they actually understated the potential loss of matching federal dollars.

The Complainant also argues that the statements are false because, contrary to the claim in the flyer, a reduction in state funding does not automatically result in an equal reduction in federal funding. The Complainant maintains that depending on how the cuts are implemented, there are several areas where state funding may be reduced without triggering a corresponding cut in federal funding. As examples, the Complainant notes that cuts to solely state-funded programs for the elderly would not result in cuts to federal funding, and reductions in the rate of reimbursement to nursing homes would not trigger federal funding cuts.

Finally, the Complainant asserts that the statements are false because nursing homes and long term care for the elderly and disabled persons account for only 16% of the total state budget for Medical Assistance. Thus, according to the Complainant, a 15% cut to state funding for Medical Assistance "could be implemented without any reduction in funding for nursing homes or disabled persons."

The Complainant concedes that he lacks clear and convincing evidence that the Respondent knew the statements were false. However, the Complainant maintains that the Minnesota House Research report itself identifies possible ways state funding could be cut without triggering a corresponding cut in federal funding. In addition, the Complainant contends that the fact that the DFL Party previously promoted its own across-the-board budget cuts implies that the Respondent disseminated the statements in the flyer with reckless disregard as to their falsity.

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[17] *Sauter v. Sauter,* 70 N.W. 2d 351, 353 (Minn. 1955).

[18] *Northern States Power Company v. Minnesota Metropolitan Council, Minnesota Department of Transportation, et al*., 684 N.W.2d 485, 491 (Minn. 2004); *Funchess v. Cecil Newman Corp*., 632 N.W.2d 666, 672 (Minn. 2001).

Viewing the evidence submitted in the light most favorable to the Complainant, the panel concludes that the statements on the flyer that "a 15 percent cut by the state is also a 15 percent cut by the federal government … add[ing] up to a 30 percent cut for the care of the elderly and disabled" are not factually false. The statements were made in the context of Medicaid funding for nursing homes. The Respondent has put forward ample evidence that the federal share of Medical Assistance costs for Minnesota is usually 50 percent, and that state cuts in Medicaid spending typically result in a loss of the matching federal share.

Complainant's argument that the flyer's claims of federal funding cuts were false because they were not pessimistic enough and his assertion that there are ways to cut state funding to other programs that serve the elderly and disabled without triggering a corresponding cuts in federal funding are insufficient to defeat Respondent's motion for summary disposition. The state-funded Alternative Care program cited by the Complainant is not a Medicaid funded program. Thus, the fact that cuts to that program will not result in corresponding cuts in federal funding is both obvious and irrelevant. The statements on the flyer were limited to nursing home services for the elderly and disabled that are funded in part by the Medicaid program.

Moreover, there is no requirement that campaign material be thorough or complete. Respondent's flyer was directed at Medicaid funding for nursing homes. The Complainant himself conceded during oral argument that it was theoretically possible that a 15% cut in state Medicaid spending would produce a corresponding 15% cut in federal dollars contributed. Respondent was not required to discuss other health care programs that serve the elderly and disabled that may not suffer a loss of federal funding in the event of state cuts in spending. Minnesota's appellate courts have repeatedly held that the statute is not broad enough to prohibit incomplete and unfair campaign statements, even those that are clearly misleading.[19] At most the statements are an unfavorable deduction or conclusion based on fact and as such they do not come within the purview of the statute.[20] In addition, the fact that the Respondent chose to use the more conservative 50 percent federal funding match in its flyer instead of the 60 percent federal funding that occurred under the stimulus bill does not render the statements factually false. If the statement is true in substance, inaccuracies of expression or detail are immaterial.[21]

Finally, the Complainant concedes he has no evidence that the Respondent knew the statements were false and he presented insufficient evidence that Respondent published the statements with a "high degree of awareness" of their probable falsity. The fact that Senate and House DFL members may have also proposed an across-the-board budget cut is irrelevant

[19] *See Bundlie v. Christensen*, 276 N.W.2d at 71 (statements telling only one side of the story, while unfair and unjust, were not untrue and therefore not actionable under predecessor statute).
[20] *See, Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).
[21] *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

and may not be attributed to the DFL Party's knowledge or awareness of whether the statements in the flyer were false.

The Complainant has produced no evidence that the statements at issue are factually false or that the Respondent disseminated them with reckless disregard as to whether they were false. Accordingly, Respondent's motion for summary disposition is granted and the Complaint is dismissed. The evidentiary hearing in this matter scheduled for April 27, 2010, is canceled.

**B.L.N., R.C.L., J.E**.